

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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| LARRY D. BRYANT |) | |
| Claimant |) | |
| |) | |
| VS. |) | |
| |) | |
| PRESTIGE |) | |
| Respondent |) | Docket No. 1,031,219 |
| |) | |
| AND |) | |
| |) | |
| TRAVELERS PROPERTY CASUALTY |) | |
| CO. OF AMERICA |) | |
| Insurance Carrier |) | |

ORDER

Claimant requests review of the April 9, 2008 Award by Administrative Law Judge Thomas Klein. The Board heard oral argument on July 8, 2008.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Brian Collignon of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is a claim for bilateral upper extremity injuries. The Administrative Law Judge applied the principles set forth in *Casco*¹ and determined claimant's injuries did not result in permanent total disability. The ALJ awarded claimant permanent partial disability

¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *rev. denied* (2007).

benefits under the schedule of K.S.A. 44-510d for a 15 percent functional impairment to his right hand and a 15 percent impairment to his left hand.

Claimant requests review of the nature and extent of disability. Claimant argues he is permanently and totally disabled. In the alternative, claimant argues he suffered a 23 percent functional whole person impairment. And if he is determined to have suffered a whole person functional impairment he further argues he would then qualify for an 82 percent work disability based upon a 100 percent task loss and a 64 percent wage loss.

Respondent requests the Board to affirm the Award.

The primary issue is whether the respondent rebutted the presumption that claimant was rendered permanently and totally disabled as a result of the bilateral upper extremity injuries he sustained while working for respondent. If the presumption of permanent total disability is rebutted the issue then becomes whether claimant suffered a whole person functional impairment which would entitle him to a work disability analysis or whether he is limited to two separate awards under K.S.A. 44-510d for his scheduled bilateral upper extremity injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant became employed full-time as a door sander for respondent in 2000. His job duties required him to use an air sander daily. He held a 30-40 pound door in one hand and used the pneumatic sander with the other hand. This required him to use a forceful grip on the vibrating sander as well as pushing and pulling of a pallet of doors. Claimant began to experience problems with his hands when he tried to pick up things. By March 2006, he began to experience complete numbness in his hands. Claimant reported his problems to his supervisor and he was referred to F. Allen Moorhead Jr. for treatment.

Dr. Moorhead prescribed anti-inflammatories, therapy and splints. While claimant was being treated by Dr. Moorhead his employment with respondent was terminated on April 18, 2006. Claimant testified that he was told he was terminated because he violated company policy and cussed out a supervisor. Claimant also testified that he was terminated because he filed a workers compensation claim. And claimant denied he had ever received any warnings from respondent regarding his conduct at work. Gary Mattson, respondent's human resources manager, testified that he reviewed claimant's personnel file which contained documents that indicated claimant had been counseled and warned regarding tickling and poking co-workers. The file also contained handwritten complaints from co-workers regarding statements claimant allegedly made to some co-workers in April

2006. Finally, Mr. Mattson noted the file contained an internal document which indicated claimant was terminated for violation of the respondent's sexual harassment policy.

Ultimately, Dr. Moorhead referred claimant to Dr. Harry A. Morris, a board certified orthopedic surgeon. Dr. Morris saw claimant on May 8, 2006. Dr. Morris performed an examination of claimant and diagnosed him with bilateral carpal tunnel syndrome. A carpal tunnel release was performed on claimant's right hand on May 30, 2006, and then the left hand was done on July 6, 2006. The doctor released claimant to return to work without restrictions on September 27, 2006. At the last office visit Dr. Morris also had sensory and strength testing performed which resulted in inconsistent findings. Dr. Morris testified:

Q. Okay. And can you describe for the Court what the inconsistency was with the sensory testing?

A. Well, the measurements that he gave in his strength testing were so low that they were not believable. His hands are fairly large, they're calloused hands, and when you do the strength testing, you're supposed to give your maximum effort, and there were none of the what we call accessory signs to show that he was giving his maximum effort.²

Based upon the *AMA Guides*³, the doctor testified claimant had a 15 percent functional impairment to each upper extremity at the level of the hand. Dr. Morris further opined that claimant had no impairment as a result of the scarring from the surgeries. The doctor imposed no permanent restrictions and opined claimant would be able to continue working using vibratory tools.

Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant at his attorney's request. On October 30, 2006, Dr. Prostic took a history from claimant and performed a physical examination. Claimant complained of pain in both hands near his scars in the palm of his hands as well as weakness, numbness and tingling. The doctor opined the claimant's physical examination was consistent with the claimant's complaints of pain as well as the mechanism of his work-related injury. Dr. Prostic diagnosed the claimant with continued evidence of bilateral carpal tunnel syndrome despite his previous surgery and painful scars as well as thoracic outlet syndrome. The doctor recommended a repeat EMG and possible surgery. Dr. Prostic imposed restrictions against work that required repetitious or forceful activities with either hand.

In a letter to claimant's attorney dated December 8, 2006, Dr. Prostic reviewed the records from his previous examination of claimant and opined claimant has a 20 percent

² Morris Depo. at 10-11.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

permanent partial functional impairment to each upper extremity for a combined impairment of 23 percent to the body as a whole. When deposed, Dr. Prostin explained that in addition to the 20 percent to each upper extremity for moderate carpal tunnel syndrome, claimant also should get several percent of each upper extremity for scarring which he combined with the ratings to each upper extremity for a combined 23 percent whole person functional impairment.

On cross-examination, Dr. Prostin agreed that he had just recently started including a rating for scarring when rating for surgically treated carpal tunnel syndrome. And based upon his restrictions, Dr. Prostin agreed there were jobs claimant could perform.

Dr. Prostin reviewed the list of claimant's former work tasks prepared by Ms. Terrill and concluded claimant could no longer perform 9 of the 14 tasks for a 64 percent task loss. But Dr. Prostin further opined that claimant is permanently and totally disabled from performing any substantial and gainful employment due to his age, education, location, work history, and physical restrictions.

Mary L. Sylvester, a school psychologist, administered a Stanford Binet IQ (intellectual potential) test and the Woodcock-Johnson III achievement (academic) test to the claimant. Ms. Sylvester testified claimant had an IQ of 84 which placed him in the below average category.

Karen Terrill, a vocational rehabilitation counselor, conducted a telephone interview with claimant on January 11, 2007, at the request of claimant's attorney. She prepared a task list of 14 nonduplicative tasks claimant performed in the 15-year period before her injury. At the time of the interview, the claimant was working in receiving for Amazon.com through Staff Management, a temporary service. Ms. Terrill opined claimant was unable to perform substantial and gainful employment based upon his age, education, transferrable skills, injury and restrictions.

Steve L. Benjamin, a personnel consultant, conducted a personal interview with claimant on October 1, 2007, at the request of respondent's attorney. He prepared a task list of 27 nonduplicative tasks claimant performed in the 15-year period before his injury. At the time of the interview, claimant was not working. Although Mr. Benjamin opined claimant did not have many transferrable skills, he found claimant was capable of working as a cashier, rental clerk, home attendant, office cleaner and a shipping/receiving clerk. Mr. Benjamin concluded claimant was capable of earning from \$282.80 to \$374 or an average of \$336.90 per week.

After Dr. Morris released claimant to return to work without restrictions on September 27, 2006, claimant then obtained employment with Amazon in October 2006 where he worked until he was included in a company wide lay off on January 18, 2007. Claimant's job was stacking 5 to 25-pound boxes onto pallets and he occasionally would sweep floors. He worked four ten-hour days earning \$9.50 an hour. Claimant initially

testified that his work at Amazon only hurt his hands a little because he had not been used to working. He testified:

Q. Did you have any trouble working at Amazon physically?

A. No. Not really. It kind of hurt just a little bit, but I explained to them and they said do what you - - do the best you can do.

Q. What hurt just a little bit?

A. My hands hurt just a little bit because I hadn't been used to work.

Q. Did that get better as you became used to work?

A. The pain stayed about the same.⁴

However, when claimant later testified he stated that he was unable to do the job at Amazon because it hurt his hands. And he further testified that he took a voluntarily layoff because it was too hard on his hands which were swollen and painful. He finally stated that he physically could not do the job at Amazon. Although claimant has not worked since he was laid off at Amazon, he continues to look for employment. And claimant testified that he thought he could physically perform a housekeeping job or a job stocking shelves.

Under *Casco*, there is a presumption that claimant is permanently and totally disabled under K.S.A. 44-510c. In addition, claimant presented the expert testimony of vocational counselor Karen Crist Terrill, board certified orthopedic surgeon Dr. Edward J. Prostic and school psychologist Mary Lynn Sylvester to support that presumption.

Respondent countered the claimant's evidence with claimant's own statements and the expert testimony of board certified orthopedic surgeon Dr. Harry Morris and vocational rehabilitation counselor Steve Benjamin. It is significant to note that when claimant was first deposed he testified that his hands hurt a little during the four months he worked at Amazon and that he was laid off after a seasonal decrease in business. Claimant then later changed that testimony to indicate he volunteered to be laid off because of hand pain.

Dr. Morris concluded that claimant could continue working as he did not require restrictions. Vocational rehabilitation counselor Steve Benjamin opined claimant did not have many transferrable skills, but he found claimant was capable of working as a cashier, rental clerk, home attendant, office cleaner and a shipping/receiving clerk. And that matches claimant's testimony that he physically could still do a housekeeping job or stock shelves. Simply stated, the Board cannot ignore the fact claimant returned to work for four months at Amazon and was laid off due to a company wide reduction in business.

⁴ Bryant depo at 14.

Moreover, Dr. Prostic, on cross-examination, agreed there were jobs that claimant was physically able to perform. Finally, claimant's IQ and achievement scores are not persuasive evidence that claimant cannot obtain and perform substantial gainful employment in this case. Although claimant's testing placed him in a below average IQ category he nonetheless has over the years successfully maintained employment in the open labor market. And claimant obtained substantial gainful employment following his release to work after his surgeries. Although claimant's labor market has been diminished by his bilateral upper extremity injuries, the presumption against permanent total disability has been overcome and the evidence fails to prove that claimant is permanently and totally disabled.

Claimant next argues that he is entitled to a whole person functional impairment rating because Dr. Prostic provided a whole body rating for the scars on his hands. Conversely, Dr. Morris concluded that claimant's scars had healed appropriately and he did not believe a rating for the scars was appropriate. Significantly, Dr. Morris noted that claimant's complaint of pain in the scars was inconsistent. During examination when Dr. Morris pressed on the scars claimant complained of tenderness but other times when Dr. Morris rubbed on the scars while talking to claimant there were no pain complaints. It is interesting to note that although Dr. Prostic has for years provided ratings for surgically treated bilateral carpal tunnel syndrome, he just recently started rating for scarring. Moreover, Dr. Morris noted that if a rating was appropriate for the scarring it would be limited to the extremity and would not be a whole person functional impairment.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁵ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁶

The Board finds that Dr. Morris' rating is more persuasive and that claimant has suffered a 15 percent impairment to each upper extremity at the level of the hand. The Board finds that claimant is not entitled to an additional percentage of functional impairment for the surgical scar in this instance. Furthermore, even if the scar was rateable, that rating would be to the hands and not to the body as a whole. Accordingly, the Board does not need to address the evidence of wage and task loss or the claim for work disability.

⁵ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁶ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

The Kansas Supreme Court in the *Casco* decision held that bilateral upper extremity injuries create the presumption that a worker is permanently and totally disabled and when that presumption is rebutted the injured worker's permanent disability benefits for each upper extremity are determined under the schedule of K.S.A. 44-510d.

Based upon the *AMA Guides*, Dr. Morris opined claimant suffered a 15 percent functional impairment to each extremity at the level of the hands due to carpal tunnel syndrome. Both of those extremities are listed in K.S.A. 44-510d. Thus, under the *Casco* analysis, claimant is entitled to recovery based upon *two separate scheduled injuries*. Accordingly, the ALJ's Award is affirmed.

As indicated above, the presumption of a permanent total disability is rebutted. Claimant sustained a 15 percent impairment to each upper extremity at the level of the hand as measured by the *AMA Guides* and, therefore, claimant is entitled to receive permanent disability benefits based upon those functional impairment ratings for two scheduled injuries under K.S.A. 44-510d.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated April 9, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Brian Collignon, Attorney for Respondent and its Insurance Carrier

LARRY D. BRYANT

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Thomas Klein, Administrative Law Judge